we are asked to follow. We cannot therefore accede to that application.

The result is that the appeal must be dismissed with costs.

Appeal dismissed.

J. V. W.

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DOMA SAHU v. NATHAI KHAN.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice Porter.

KALACHAND SIRCAR AND OTHERS *v.* QUEEN EMPRESS.°

1886 *April* 16.

Evidence Act (I of 1872), s. 154—Hostile witness.

The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.

IN this case there were four persons committed to the Sessions Court and charged as follows:—

Kalachand Sircar and Moser Sheikh with the murder of one Sital Chunder De, and with having wrongfully confined the said Sital Chunder De and four other persons, namely, Ketu, Adu, Lalu and Meher, and with causing hurt to them with the object of compelling them to confess to the commission of theft and of compelling them to restore the property stolen.

Prannath Shaha with abetting all the above offences.

And Prosunno Coomar Shome, head constable, with abetment of hurt only.

The facts as stated by the prosecution were: That on the 18th October 1885 the house of one Shibnath Sircar was broken into and property stolen therefrom; that on the night of the 19th October Ketu, Adu, Lalu and Meher were brought to the house of Prannath Shaha and were there tortured and beaten with the object of extorting a confession from them regarding the persons implicated in the theft from Shibnath Sircar; that at a later

° Criminal Appeal No. 173 of 1886, against the order passed by W. H. Page, Esq., Sessions Judge of Furridpore, dated the 4th of January 1886.

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period that night Kalachand Sircar and Moser Sheikh were sent to bring Sital Chunder De to the same place, representing to him that he was sent for by Prosunno Coomar Shome the head constable; that on his appearance he was beaten so severely that he died of the injuries received then and there; that the body of Sital was then removed from the house and placed on the side of the road not far from the house; that a nephew of the deseased the next morning went to the Police station and informed the police that the persons who had committed the crime were, Prannath Shaha and his servants, Kalachand Sircar, Moser Sheikh, the head constable Prosunno Coomar, and a number of subordinate police officers.

The matter was then inquired into by the Magistrate. Ketu, Adu, Lalu and Meher then gave evidence to the effect that the outrage was committed by Prannath Shaha and his servants, representing the police as taking no active part in the transaction.

On this part of the case in the Sessions Court the same witnesses, Ketu, Adu, Lalu and Meher there deposed that the two servants of Prannath, Kalachand and Moser Sheikh, took part in the outrage upon Sital, but that they did so neither in the presence nor with the sanction of Prannath Shaha, but under the orders of Prosunno Coomar Shome, the head constable.

At the time when each of the four witnesses in turn gave this evidence, the Government pleader, considering the witness to be hostile, asked permission of the Court to cross-examine under s. 154 of the Evidence Act. Objection to this was taken, but overruled, and the Government pleader, on obtaining leave from the Court, elicited from each witness that he had made a different statement in the Magistrate's Court; and in turn each witness thereupon stated that the evidence given by him before the Magistrate was the real truth of the story.

It was in the course of the trial in the Sessions Court proved that Ketu, Adu, Lalu and Meher were men of the worst character, two of them being at the time under police surveillance.

The Sessions Judge and the Assessors, considering that the story told by these witnesses before the Magistrate's Court was not to be believed, rejected the story given by them in the Sessions

Court, save so much thereof as was elicited in the cross-examination held under s. 154 of the Evidence Act, and was confirmatory of the evidence given in the Magistrate's Court.

The prisoners Kalachand and Moser were thereupon found guilty of culpable homicide not amounting to murder, and were sentenced to rigorous imprisonment for seven years; and Prannath Shaha, who was found guilty of abetment of the same offence, was sentenced to ten years' rigorous imprisonment; Prosonno Coomar Shome being acquitted.

The prisoners Kalachand, Moser and Prannath appealed.

Mr. *M. P. Gasper* (with him Baboo *Jasoda Nundun Pramanick*) for the appellants.—The treatment of the four witnesses of the Crown as hostile was not justifiable; there was no hostility, they merely made two contradictory statements. The effect of their evidence, I submit, is that they have proved themselves to be utterly unworthy of belief; all the evidence in chief brought out under s. 154 ought to be struck out, and there being no other evidence directly in point the prisoners must be acquitted. The evidence given by the witnesses before the Magistrate is not sufficient to convict unless it is corroborated by independent testimony. *See Queen* v. *Amanullah* (1). As to the result of such cross-examination *see Faulkner* v. *Brine* (2); *Wright* v. *Beckett* (3); *Reg* v. *Ball* (4).

[WILSON, J.—The English law at the time the last case was decided was entirely different to the law out here.] I refer to that case for the conclusion that you were formerly not allowed to do away with the effect of such evidence.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The Court (WILSON and PORTER, JJ.) were of opinion that the convictions could not safely be sustained, and acquitted the prisoners; but as regards that part of the case touching upon the cross-examination of the four witnesses for the prosecution under s. 154 of the Evidence Act, the following passage in their judgment is extracted:—

(1) 21 W. R., 49.
(2) 1 F. & F., 254.
(3) 1 M. & R., 423.
(4) 8 C. & P., 745.

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The Sessions Judge, in concurrence with the assessors who sat with him, has selected the story told by the four witnesses for the prosecution before the Magistrate, and has rejected the one that was told before him. He arrived at this result partly in this way:—When the witnesses, one after another, told the story sworn to in his own Court, he allowed the advocate for the prosecution to cross-examine these, his own witnesses, apparently on the ground that they were hostile (of which we can see no trace), and so brought out by reference to their depositions given before the Magistrate the story which had been given in the Magistrate's Court.

It appears to us that there was no sufficient ground for allowing such cross-examination. We can see nothing on the face of their evidence to lead to the supposition that they were hostile witnesses, that is, witnesses who were trying to defeat the prosecution by suppressing the truth. The mere fact that at a sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from the contradictions in their evidence—contradictions so far as Prannath is concerned, not in the details, but in the whole texture, of the story—is not that they are witnesses hostile to this side or to that, but that they are witnesses who ought not to be believed, unless supported by other satisfactory evidence, which they are not. That in itself is sufficient to show that the conviction of Prannath cannot be supported.

But it is a somewhat different question whether the conviction of Kalachand and Moser Sheikh can be supported. As to them, these four witnesses, Adu, Meher, Ketu and Lalu, have not contradicted each other in any specific and precise way; but there is a substantial contradiction between the story now told against Kalachand and Moser Sheikh, and the story as told in the first information given at 4 o'clock on the day after the occurrence. In the first information it was represented that the outrage was committed by Prannath and his servants, and Prosunno Coomar the jemadar, and the whole body of the police. That is quite inconsistent with the story believed in the Court below, that Kalachand and Moser Sheikh

and others committed this crime with the sanction of Prannath, and in his presence, or with the other story that they did so under the orders of Prosunno Coomar, the police jemadar alone.

When these witnesses have told such fundamentally different stories about the whole transaction, and when they are proved to be disreputable men, and the story told by them is on the face of it so full of unexplained improbabilities, we do not think it safe to act upon their unsupported testimony as to the *parts* these two men, Kalachand and Moser Sheikh, are said to have taken in the alleged outrage.

We, therefore, set aside the convictions and acquit all three prisoners, Prannath Shaha Chowdhuri, Kalachand Sircar and Moser Sheikh, and direct their release.

Conviction set aside.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

LALLA CHEDI LAL AND OTHERS (PLAINTIFFS) *v.* RAMDHUNI GOPE AND OTHERS (DEFENDANTS.)* 1886 *February* 11.

Bengal Act VIII of 1869, *s.* 38—*Measurement of waste lands—Bengal Civil Court's Act* (*VI of* 1871), *s.* 22—*Appeal.*

An application for the measurement of a whole estate under s. 38 of Bengal Act VIII of 1869 cannot be granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes.

Before a measurement can be ordered under that section, it is necessary to establish by evidence the facts set out in the petition for measurement; and to show that the lands sought to be measured are known, but that the tenants liable to pay rent in respect of such lands are unknown.

IN January 1882 Lalla Chedi Lal and others, the proprietors of mouzah Ahiari, applied to the Subordinate Judge of Mozufferpore,

* Special Appeal No. 1488 of 1884, from the decision of A. C. Brett, Esq., District Judge of Tirhoot, dated 19th May 1884, reversing the decision of J. C. Price, Esq., Collector of Dhurbhanga, dated 31st August 1883, and the Robocari of Baboo Ram Pershad Rai, the Sub-Judge, dated 22nd March 1884.